Supreme Court, U.S.
FILED
(1)
No. 982048 JUN 17 1999

In The Supreme Court of the United States

OCTOBER TERM, 1998

HOMER W. WALKER,

Petitioner,

v.

NATIONSBANK, JOE TEMPLE, C. KIM NAZARCHYK, and FAYE MCDANIEL,

Respondents.

On Petition for Extraordinary Writ to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR EXTRAORDINARY WRIT

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39pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court lack subject matter jurisdiction, pursuant to 28 U.S.C. § 1441 (b) over a Cumberland County, North Carolina, Superior Court civil action, where petitioner relied solely on state law, that was removed to federal court by defendants, where there is no diversity of citizenship, the defendants are not state actors, and the governments was not involved in the activity that caused the injury?

2. Did the United States District Court abuse its discretion when it denied petitioner's motion to remand petitioner's state law claim back to state court, and rendered petitioner's motion to remand moot?

3. Did the United States District Court abuse its discretion when it denied petitioner's Rule 60 motion, to set aside its order rendering petitioner's motion to remand moot, and then enter an order barring petitioner from re-litigating his state law claim in state court or federal court, when federal jurisdiction did not otherwise exist?

4. The Fourth Circuit Court of Appeals has denied petitioner mandamus relief in this case, to remand petitioner's state law claim back to state court. Is that denial so contrary to federal law and so self-contradictory that this court should exercise its power of supervision and reverse the Fourth Circuit?

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In The
Supreme Court of the United States

October Term, 1998

HOMER W WALKER,

Petitioner

V.

NATIONSBANK, JOE TEMPLE, C. KIM NAZARCHYK, AND FAYE MCDANIEL,

Respondents.

Petition for an Extraordinary Writ to the United States District Court for the Eastern District of North Carolina

---

Petitioner respectfully prays that an Extraordinary Writ issue to review the judgment below.

OPINIONS BELOW

1. On May 23, 1996, the Honorable Jack A. Thompson, a Cumberland County Superior Court Judge, entered an order pursuant to Rule 41 (b) of the North Carolina Rules of Civil Procedure for involuntary dismissal without prejudice to the right of petitioner Homer W. Walker, to re-file his state-law claim in Cumberland County Superior Court as he deem fit. The order of Judge Thompson is set out in Appendix – A.

2. On April 29,1997, the Honorable W. Earl Britt, a United States Judge, entered an order dismissing petitioner's first re-

filed claim from federal court for lack of subject matter jurisdiction. The order of Judge W. Earl Britt is set out in Appendix – B.

3. On December 19, 1997, United States Judge Terrence W. Boyle entered an order pursuant to Rule 41(b) of the Federal Rules of Civil Procedure dismissing petitioner's second re-filed claim from federal court, and; barring petitioner from re-litigating the action, and rendering petitioner's motion to remand the claim back to Cumberland County Superior Court moot. The order of Judge Boyle is set out in Appendix – C.

4. On November 26, 1998, United States District Court judge Terrence W. Boyle entered an order denying petitioner's Rule 60 motion and: ordered petitioner to show cause why petitioner should not be ordered to pay a penalty of $1,000 to the court. Judge Boyle further directed the Clerk of Court not to accept any filing from the petitioner other than one showing cause why sanctions should not be imposed. That order of Judge Boyle is set out in Appendix – D.

5. On January 10, 1999, United States District Court Judge Terrence W. Boyle entered an order denying petitioner's request to reconsider the November 26, 1998 order, and permanently enjoined petitioner from filing, commencing, or attempting to initiate any new action or proceeding and ordered the Clerk of Court to take such action as necessary to implement the pre-filing injunction. This order is set our in Appendix – E.

6. On January 13, 1999, the District Court entered its final judgment. That judgment is set out in Appendix – F.

7. The opinion of the Fourth Circuit Court of Appeals denying petitioner mandamus relief is set out in Appendix – H.

JURISDICTION

This court has jurisdiction over this petition for an extraordinary writ, as authorized by 28 U.S.C. § 1651 (a). This petition is filed in accordance with Supreme Court Rule 20.1. On June 1, 1999 the Fourth Circuit Court of Appeals denied petitioner mandamus relief, by unpublished per curiam opinion. The exceptional circumstance of this petition warrants the exercise of this court's discretionary powers, and adequate relief cannot be obtained in any other form or from any other court.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Constitutional violation of the fourteenth amendment equal protection clause which guarantees that all person(s) circumstances, similarly situated, shall be treated alike, to include access to the courts for civil redress as well as denial of due process and obstruction of justice.

STATEMENT OF THE CASE

1. Petitioner properly filed a civil action against NationsBank, Joe Temple, C. Kim Nazarchyk, and Faye McDaniel in the Superior Court Civil Division of Cumberland County, North Carolina, on June 6, 1995. The claims consisted of: racial discrimination, false statement, false arrest and detention, and false imprisonment, causing petitioner loss of liberty and property. Respondents properly responded within the 30-day time frame. Attached to respondent's answer was a motion to dismiss, pursuant to Rule 12 (b) (6), and a motion for summary judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

2. On November 13, 1995, oral arguments were heard before the Honorable Cy A. Grant regarding petitioner's claim and defendant's motion to dismiss and motion for summary judgment. As a result of that hearing, the Honorable Cy A. Grant denied the defendant's motion to dismiss and motion for summary judgment.

3. On December 7, 1995, at the trial setting conference, a trial by jury date was set for May 20, 1996.

4. On May 20, 1996, when the case was called for trial by jury, petitioner was involuntarily confined and unable to appear in court to prosecute the matter. Based on the fact that petitioner was involuntarily confined, the court entered an order pursuant to Rule 41 (b) of the North Carolina Rules of Civil Procedure for involuntary dismissal without prejudice to the right of the petitioner to re-file his claim as he deem fit.

5. On November 18, 1996, pursuant to the order of Judge Jack Thompson, petitioner re-filed his claim in Cumberland County Superior Court.

6. On December 12, 1996, defendants removed petitioner's claim to federal court, pursuant to Rule 28 U.S.C. § 1441 (b).

7. On April 29, 1997, the Honorable W. Earl Britt dismissed the matter from federal court for lack of jurisdiction.

8. On May 6, 1997, petitioner again re-filed his state law claim in Cumberland County Superior Court, pursuant to the order of Judge Thompson.

9. On June 4, 1997, the defendant's again removed petitioner's state court action to federal court, pursuant to Rule 28 U.S.C. § 1441 (b). This second removal appears on the federal court docket under file no. 5:97-CV-450-BO (2).

10. On July 1, 1997, petitioner filed a motion to remand his state court action back to state court.

11. On July 8, 1997, defendants filed a motion to dismiss and a motion for anti-suit injunction.

12. On December 19, 1997, the court entered an order rendering petitioner's motion to remand as moot, dismissing petitioner's claim and barring petitioner from re-litigating his civil action in state or federal court.

13. On September 15, 1998, petitioner filed a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure to set aside the judgment order entered on December 19, 1997, together with supporting memorandum of law requesting that the matter be remanded back to state court.

14. On November 26, 1998, the court entered an order denying petitioner's Rule 60 motion, and ordered the petitioner to show cause as to why the court should not order the petitioner to pay a penalty of $1,000 to the court for filing the Rule 60 motion. Further, the Clerk of Court was directed not to accept any further filings from the petitioner, other than the one showing cause as to why sanctions should not be imposed on petitioner.

15. On December 4, 1998, in keeping with the order of the court, petitioner filed a motion to show cause and requested that the court reconsider its order denying petitioner's Rule 60 motion.

16. On January 10, 1999, the court entered its order in the show cause motion. The court imposed a non-financial sanction on the petitioner and placed the petitioner under a pre-filing injunction, permanently enjoining the petitioner from filing, commencing, or attempting to initiate any new lawsuit, action, proceeding, or matter in federal court and directed the Clerk of Court to take such actions as are necessary to implement the pre-filing injunction.

17. On March 4, 1999, petitioner filed motion for mandamus pursuant to 28 USC § 1361 in the Fourth Circuit Court of Appeals. In petitioner's motion for mandamus, petitioner set out specific duty owed to petitioner. The verbatim motion for mandamus, is set out in Appendix – G.

18. On June 1, 1999, the Fourth Circuit Court of Appeals, in an unpublished per curiam opinion, denied petitioner's motion for mandamus relief. That opinion is set out in Appendix – H.

REASON FOR GRANTING AN EXTRAORDINARY WRIT

1. Petitioner's claim is well-grounded in state law and fact, and shows on its face the lack of federal jurisdiction or federal question. The fact that the defendants were seeking to remove a state action to federal court seeking a federal defense has been put to bed by several of the United States Appeal Courts and most recently by the United States Supreme Court, which is the law of the land. In the instance of this case, despite the fact that the defendant's tried to restate the petitioner's claim into claims that required interpretation of federal law, federal jurisdiction did not exist. The case law is well-settled on the fact that the plaintiff is the master of his claim – Thomas V. North Carolina Department of Human Resources (N.C.D.H.R.) is illustrative on this point. In the Thomas case, the plaintiff filed a complaint in 1991 against the N.C.D.H.R. in Guilford County Superior Court, alleging the N.C.D.H.R. denial of her application for food stamps violated the Food Act. The Superior Court upheld the denial of the plaintiff's application. The plaintiff then appealed to the North Carolina Court of Appeals. The North Carolina Court of Appeals reversed the decision of the trial court and remanded for summary judgment in favor of the plaintiff. The N.C.D.H.R. then attempted to circumvent the North Carolina Court of Appeals ruling. The Secretary of the United States Department of Agriculture intervened in his official capacity and removed the case to federal court. Upon removal, the United States District Court for the Middle District of North Carolina, Greensboro Division, held that:

"The plaintiff is the master of his claim, and thus if the plaintiff chooses not to assert a federal claim, the defendant cannot remove on the basis of a federal question, even if the plaintiff could have asserted a federal claim." U.S. Chief Judge Bullock also held that: 1) the Secretary of Agriculture, named as defendant in his

official capacity cannot remove case under officer removal statute, and 2) The plaintiff's claim did not present federal question and the District Court lacked subject matter jurisdiction. He then remanded the case back to state court. Thomas V. North Carolina Department of Human Resources, 898 F. Supp. 315 (M.D.N.C. 1995).

2. The defendants cannot, merely by injecting a federal question into an action that asserts what is plainly a state claim, transform the action into one arising under federal law. Further, in the instance of the original case, federal jurisdiction never existed. Caterpillar, Inc. V. Cecil Williams is illustrative on this point. In the case of Caterpillar, the plaintiff filed an action against the defendant in California State Court. Based totally on state law, the defendants removed the action to the United States District Court for the Northern District of California, and argues that this removal was proper. The District Court held that removal was proper and dismissed the case. The plaintiff appealed to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the District Court's dismissal and held that:

"1) The case was not removable to federal court because the plaintiff's state-law claims were not grounded upon rights or liabilities created by the collective bargaining agreement. 2) The defendant's claim that its collective bargaining agreement with the union superseded all previous individual employment contracts was irrelevant and a defensive allegation."

On Certiorari, the United States Supreme Court affirmed the actions of the Court of Appeals. The Supreme Court held that:

1) Removal of causes from state to federal court is authorized only where original federal jurisdiction exists, 2) a case may not be removed from state to federal court on the basis of a federal defense, including the defense of

preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. The Supreme Court further held that: **3) the plaintiff is the master of his claim. If he chooses to have the case heard in state court, a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state law claim, transform the action into one arising under federal law, thereby selecting the forum under which the claim shall be litigated. If the defendant could do so, then the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.** Caterpillar, Inc. V. Williams, 96 L Ed 2d 318, 107 S Ct.

3. The order of the Honorable Terrence W. Boyle, entered on December 19, 1997, rendering petitioner's motion to remand moot, cannot act as a defense for the defendants to bar the court from remanding this action back to state court or to bar the court from granting the petitioner's Rule 60 motion. The case of Rose M. Carpenter V. Wichita Falls School District, is illustrative on this point. In the case of Carpenter, the plaintiff brought federal action alleging First Amendment violation and state action alleging breach of contract and violation of free speech rights under the state Constitution against the school district.

The school district removed the state case to federal court and the cases were consolidated. The United States District Court for the Northern District of the state of Texas denied the plaintiff's motion to remand the case to the state courts. The plaintiff then appealed this decision to the 5th Circuit Court of Appeals., That court held that: **1) The plaintiff's state complaint was not federal in character and the District Court lacked subject matter jurisdiction over the complaint**, and **2) Because the effect of removal is to deprive the state court of action properly before it,**

defendants may not remove on the basis of anticipated or even inevitable federal defense, but instead must show that federal right is an element, and an essential one, of the plaintiff's cause of action, because removal raises significant federalism concerns. The Appeals Court then reversed the District Court's denial of Carpenter's motion to remand and remanded the case to the state court for further action. Rose. M Carpenter V. Wichita Falls School District. 44 F 3d 362 (5th Cir. 1995).

4. Judge Boyle also asserts in his order dated December 1. 1998 that petitioner had filed four identical lawsuits in Cumberland County, North Carolina. Superior Court, that three of those lawsuits were removed to federal court by the defendants, and that he dismissed the petitioner's third lawsuit which was removed to federal court by the defendants based on the doctrine of Res Judicata on April 3, 1998.

Federated Department Stores, Inc. V. Moitie is illustrative on this point. In the case of Moitie, several parallel civil actions were subsequently filed by private plaintiffs seeking treble damages. Each complaint tracked almost verbatim the allegations, the parties, the place and time that the infraction occurred. Each plaintiff filed his complaint in state court. Each of these complaints tracked almost verbatim the allegations of the governments, though the Moitie complaint referred solely to state law. All of the actions originally filed in the District court were assigned to a single Federal Judge, and the Moitie case was removed there on the basis of diversity of citizenship and federal question of jurisdiction. The District Court dismissed all of the actions in their entirety. Plaintiff in five of the suits appealed this judgment to the Court of Appeals. Counsel representing Moitie chose not to appeal and instead re-filed the Moitie action in state court.

The defendants removed the new action to federal court and moved to have it dismissed on the grounds of *res*

judicata. The District first denied the plaintiff's motion to remand. It held that in many respects the plaintiff's state law claims were identical to the prior complaint and thus the removal was proper. The court then concluded that because Moitie's new action involved the same parties and the same time periods, the doctrine of *res judicata* required that Moitie's new action be dismissed. When Moitie's case finally came before the Court of Appeals for the Ninth Circuit, the court reversed the decision of the District court dismissing the case. Federated Department Stores, Inc. V. Moitie, 69 L Ed 2d 103, 101 s Ct.

5. The fact that the defendants have attempted to restate petitioner's state law claim to raise a federal question, seeking a federal defense by removing petitioner's claim to federal court was recently put to bed by the United States Supreme Court in Rivet V. Regions Bank of Louisiana. In the case of Rivet, several individuals brought suit in a Louisiana state court against defendants including a bank, relying exclusively on Louisiana state law. The dispute involved only Louisiana parties. The defendants removed the case to the United States Court for the Eastern district of Louisiana on the basis of the defendant's assertion that the individual's action was precluded by some prior order of a federal bankruptcy court. The plaintiff filed a motion to remand the case back to state court. The District court denied the plaintiff's motion to remand and expressed the view that 1) the prior bankruptcy order completely precluded the plaintiff's cause of action, and 2) that this complete preclusion made removal of the case proper.

On appeal, the Appeals Court affirmed the District Court's ruling. The Court of Appeals then denied a panel rehearing and rehearing en banc. On Certiorari, the United States Supreme Court reversed this decision and remanded the case to state court. In an opinion written by Justice Ginsburg, the Court held that **even though § 1441 (b)**

provides for the removal of a case when a plaintiff's complaint alleges a claim arising under federal law, it was improper to remove under § 1441 (b) the case at hand from Louisiana state court to the District court on the basis of the defendant's assertion concerning the prior bankruptcy orders, because claim preclusion by reason of a prior federal judgment, also known as *res judicata*, is a plea that provides no proper basis for removal under § 1441 (b).

The Court then reversed and remanded. Mary Anna Rivet V. Regions Bank of Louisiana, 139 L Ed 3d 912, 118 s Ct.

6. In Shamrock Oil & Gas Corporation V. Sheets, this court held that: **so long as state court remains the preferred forum for interpretation and enforcement of state law, plaintiffs must be permitted to proceed in state court under state law. It would do violence to state autonomy were defendants able to remove state claims to federal court merely because the plaintiff could have asserted a federal claim based on the same set of facts underlying his state claim.** Shamrock Oil & Gas Corporation V. Sheets, 85 L Ed 1214, 61 S Ct. 868 (1941).

7. Respondents, in the instance of this case, did not and do not qualify as state actors. Hicks V. Southern Maryland Health Systems Agency is illustrative of this point. As a general rule, courts should hesitate to bind private individuals and entities as state actors. Constitutionalizing private conduct imposes tremendous burdens on individuals and greatly diminishes their personal freedoms. Courts find state action only after considering "1) the extent and nature of public funding to the institution. 2) the extent and nature of regulation on the institution. 3) whether the institution's activity constitutes a public function in the 'exclusive prerogative' of the state. and 4) whether there is a 'symbiotic

relationship' between the institution and the state." Hicks V. Southern Maryland Health Systems Agency, 737 F. 2d 399, 402 (4th Cir. 1984). Clearly defendants do no qualify as state actors under this test.

8. The equal protection clause of the Fourteenth Amendment guarantees that all person(s) circumstanced similarly situated shall be treated alike. "[T]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the state." Jackson V. Metropolitan Edison Company, 419 U.S. 345, 350 (1974). Additionally, "[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon the plaintiff, but with the activity that caused the injury." Fletcher V. Rhode Island Hospital Trust National Bank, 496 F. 2d 927,932 (1st. Cir), 419 U.S. 1001 (1974) (Holding bank not to be state actor despite close regulation by state and federal governments.) In the instance of this case, plaintiff's complaint does not allege a sufficient nexus between government regulation and the purported actions of the defendants to create state action.

Conclusion

Petitioner's claim is a state law claim which should properly be tried in state court. Whereas at a hearing on this matter on November 13, 1995, in Cumberland County Superior Court, Fayetteville, North Carolina, the Honorable Cy A. Grant denied the defendants' motion to dismiss and denied the defendants' motion for summary judgment. Further, on May 23, 1996, the Honorable Jack A. Thompson entered an order pursuant to rule 41 (b) of the North Carolina Rules of Civil Procedure granting involuntary dismissal without prejudice to the right of the petitioner to re-file his action against the defendants as he deem fit.

The involuntary dismissal was also without prejudice to the defendants right to assert all defenses available to them. however. removal to a federal court was not and is not a defense that was available to the defendants. in this action. The defendants were not state actors. The action that formed the basis of the petitioner's grievance did not occur under color of law. The Fourteenth Amendment erects no shield against merely private conduct Shellev V. Kraemer. 334 U.S. 1. 13 (1948).

The equal protection clause of the Fourteenth Amendment guarantees that all persons similarly circumstanced shall be treated alike. Rodriguez V. Holmes. 963 F. 2d 799 (5th Cir. 1992). Moss V. Clark. 886 F. 2d 686. 691 (4th Cir. 1989).

Quoting Plver V. Doe. 457 U.S. 202. 216 (1982). as a matter of law and the equal protection clause of the Fourteenth Amendment. which guarantees that all persons similarly circumstanced shall be treated alike. and specifically in keeping with the Supreme Court's decision in the case of Rivet V. Regions Bank of Louisiana. petitioner respectfully requests that this petition for an extraordinary writ be granted. thereby reversing the District court's denial of petitioner's motion to remand. as well as the District courts order barring petitioner from re-litigating his state law claim in state court. This action would remand the petitioner's state law claim back to Cumberland County Superior Court. from which it was unlawfully removed.

The Fourth Circuit Court of Appeals ruling in this case is directly opposite to decisions of its own rulings. in Hicks v. Southern Marvland Health Systems Agency. 737 F. 2d 399. 402 (4th Cir. 1984) and in Moss v. Clark. 886 F. 2d 686. 691 (4th Cir. 1989). as well as rulings in (1st Cir.). (5th Cir.). and most recently. the decision of the ruling of this

court in Mary Anna Rivet v. Regions Bank of Louisiana, 139 L Ed 3d 912, 118 S Ct.

This petition for an extraordinary writ should be granted.

Respectfully submitted

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NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
CUMBERLAND COUNTY	95 CVS 3380
HOMER W. WALKER and REGINALD HUDSON, *Plaintiffs,* vs. NATIONSBANK, JOE TEMPLE, C. KIM NAZARCHYK, AND FAYE MCDANIEL, *Defendants.*	ORDER

THIS MATTER coming on to be heard and being heard before the undersigned Judge Presiding at the May 20, 1996 Civil Session of Cumberland County Superior Court and it appearing to the Court that when this matter came on for trial that the defendants were present and prepared for the trial, including having witnesses subpoenaed and in all other respects being prepared to defend themselves in this action; it further appearing that the plaintiff, Homer W. Walker, was unavailable for trial, having been refused release from the federal prison system by the federal authorities for the purpose of prosecuting this civil action; it further appearing to the Court that the defendants, through counsel, moved for involuntary dismissal of this action, without prejudice, pursuant to Rule 41 (b), because of the plaintiff's unavailability for trial and the continuing unfairness and

prejudice to the defendants awaiting the uncertainty of trial at a future date; and the Court being of the opinion that the Motion should be allowed and that this matter should be involuntarily dismissed, without prejudice, however, for the plaintiff, Homer W. Walker, to refile this action, if he chooses to do so, in such a way that he can time his availability for appearance in Court;

NOW, THEREFORE, IT IS ORDERED ADJUDGED AND DECREED that this action be and is hereby dismissed, pursuant to the provisions of N.C.G.S. 1A-1, Rule 41 (b), but without prejudice to the right of the plaintiff, Homer W. Walker, to refile this action as he may deem fit. This dismissal is also without prejudice to the right of the defendants to assert all defenses available to them in the event that the action is refiled by the plaintiff Walker.

This the 23 day of May, 1996.

/S/ Jack Thompson
Judge Presiding

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:96-CV-1034-BR (1)

HOMER WALKER,	)	
	)	
Plaintiff	)	
	)	
V.	)	ORDER
	)	
NATIONSBANK, et al.,	)	
	)	
Defendants	)	

This matter is before the Court on the following motions:

1. By defendants to dismiss.

2. By defendants to stay discovery.

3. By plaintiff to amend.

The motions have been fully briefed and are ripe for ruling. Upon full consideration, the motion by plaintiff to amend is DENIED, the motion by defendants to dismiss is ALLOWED, and the motion by defendants to stay discovery is rendered moot. This action is DISMISSED.

This April 29, 1997.

/S/ W. Earl Britt
W. Earl Britt
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No 5:97-CV-450-BO (2)

HOMER WALKER.	)	
Plaintiff	)	
V.	)	
	)	**ORDER**
NATIONSBANK, JOE TEMPLE,	)	
C. KIM NAZARCHYK, and	)	
FAYE MCDANIEL.	)	
Defendants	)	

This matter is before the Court on plaintiff's Motion to Remand and defendant's Motion to Dismiss. Plaintiff's action now before this Court asserts the same claims based on identical facts and circumstances as were previously dismissed on defendant's motion by U.S. District Judge W. Earl Britt in Civil Action No. 5:96-CV-1034-BR (1). Because Judge Britt's April 29, 1997 Order did not otherwise specify the nature of the dismissal, this Court presumes the dismissal to have been with prejudice, operating as a adjudication upon the merits pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure. Plaintiff is barred from relitigating this action. Accordingly, defendant's motion is GRANTED and plaintiff's motion is MOOT.

SO ORDERED.

This 19th day of December, 1997.

/S/ Terrence W. Boyle
Terrence W. Boyle
Chief United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-CV-450-BO (2)

HOMER WALKER,	)	
	)	
Plaintiff	)	
	)	
V.	)	ORDER
	)	
NATIONSBANK, et al.,	)	
	)	
Defendants	)	
	)	

This matter is before the Court on Plaintiff's Motion for Relief from this Court's Order of December 22, 1997 pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure. In their response, Defendants request the Court to consider sanctions as necessary to halt any abuse in this matter. The underling case was the third in a series of virtually identical lawsuits filed against Defendants. These lawsuits allege "racial discrimination," "false arrest and detention," "cruel and unusual punishment," "deliberate indifference," "deprivation of character," "unfair trade practices," and other supposed wrongdoing. After this Court's order of December 22, 1997, stating that "Plaintiff is barred from relitigating this action," Plaintiff filed a fourth identical lawsuit in Cumberland County, North Carolina. That lawsuit was removed to this Court, and was dismissed based on the doctrine of *res judicata* on April 3, 1998. It appears that two additional

APPENDIX D

identical lawsuits have been filed in Cumberland County, North Carolina, for a total of six identical lawsuits.[1] The Fourth Circuit has dismissed an appeal from Walker on this matter. Plaintiff has also filed a Rule 11 Motion for sanctions against counsel for the Defendants, which was denied by U.S. District Court Judge James C. Fox on September 15, 1998.

A Rule 60 (b) Motion for Relief may be granted in instances of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or any other reason justifying relief from the operation of the judgment. No such reason is present in this case. Therefore, after full consideration, Plaintiff's Motion for Relief pursuant to Rule 60 (b) is DENIED. In essence, Plaintiff is attempting to litigate this issue for a seventh time. While Plaintiff is entitled to some liberality as a pro se litigant, abuse of the judicial system need not be tolerated.

Because of Plaintiff's abuse in this matter, this Court will impose sanctions on Plaintiff. Federal Rule of Civil Procedure 11 allows this Court to impose sanctions on an attorney or unrepresented party when that party or attorney submits a filing to the Court for "any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation." Therefore, the Plaintiff is hereby ORDERED to show cause why Plaintiff should not be ordered to pay a penalty of $1,000 to the Court. Plaintiff shall make any such showing by written filing no later than

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[1]In the sixth lawsuit, Judge William C. Gore, Jr. Of the Cumberland County, North Carolina, Superior Court, ordered Plaintiff to pay Defendant's attorneys' fees and costs, along with barring Plaintiff from filing further complaints against Defendants until these sanctions were paid and other conditions met.

APPENDIX D

December 21, 1998. The Clerk of this Court is directed not to accept any filings from the Plaintiff other than one showing cause why sanctions should not be imposed until such time as Plaintiff has complied with this Court's sanction, and to bring any accepted filings to the attention of the undersigned Judge.

SO ORDERED.

This 26th day of November, 1998.

/S/ Terrence W. Boyle
Terrence W. Boyle
Chief United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-CV-450-BO (2)

HOMER WALKER,	)	
	)	
Plaintiff	)	
	)	
V.	)	ORDER
	)	
NATIONSBANK, et al.,	)	
	)	
Defendants	)	
	)	

This matter is before this Court on Plaintiff's "Motion to Show Cause Why Sanctions Should Not Be Imposed on Plaintiff" and seeking reconsideration of the Court's order of December 1, 1998, which denied Plaintiff's Motion for Relief pursuant to Rule 60 (b). In the same December 1 order, Plaintiff was instructed to show cause why sanctions, including a $1,000.00 penalty, should not be imposed on Plaintiff.

Plaintiff has a long history of abusive litigation tactics against Defendants, as outlined in this Court's December 1 order. Nonetheless, Plaintiff submits that his "Rule 60 (b) motion was not filed with the intent to harass or to cause unnecessary delay or needless increase in cost or any other improper purpose." This Court disagrees, but, in an excess of caution and liberality, will not impose a financial sanction on Plaintiff at this time.

However, this Court will impose a non-financial

APPENDIX E

sanction designed to protect the Court and opposing parties from further abusive litigation by Plaintiff. Plaintiff's abusive litigation tactics have severely burdened Defendants, who have incurred significant legal fees. In order to prevent further abuse of the judicial system, Plaintiff will be placed under a pre-filing injunction requiring him to obtain leave of court before filing further civil actions. To be considered by this Court, any such filing must include a statement, under penalty of contempt, certifying that the claim(s) raised in the filing have never been raised or disposed of on the merits by any state or federal court. See McMahon v. F & M Bank – Winchester, 45 F.3d 426 (4th Cir. 1994).[1]

The part of the Plaintiff's filing that seeks reconsideration of Plaintiff's Rule 60 (b) motion is DENIED. Plaintiff Homer W. Walker is hereby permanently ENJOINED from filing, commencing, or attempting to initiate any new lawsuit, action, proceeding, or matter in this Federal District Court without first obtaining leave of this Court to so proceed, as described above. The Clerk of this Court will take such actions as are necessary to implement the pre-filing injunction described above.

SO ORDERED.

This 10th day of January, 1999.

/S/ Terrence W. Boyle
Terrence W. Boyle
Chief United States District Court Judge

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[1]This is an unpublished decision of the Fourth Circuit, and is cited by this Court only for the legal proposition that it is proper for a District Court to protect itself and parties from harassing and vexatious suits through the use of pre-filing injunctions.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:96-CV-450-BO (2)

HOMER WALKER.
Plaintiff

V.

NATIONSBANK. et al..
Defendants

ORDER

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED. ADJUDGED. AND DECREED that Plaintiff's filing seeking reconsideration of Plaintiff's Rule 60(b) Motion is DENIED. Plaintiff is hereby permanently ENJOINED from filing. commencing. or attempting to initiate any new lawsuit. action. or proceeding. or matter in this Federal District Court without first obtaining leave of this Court to so proceed. (BOYLE. J)

THIS JUDGMENT FILED AND ENTERED ON JANUARY 13. 1999 AND COPIES TO:

Homer Walker
P.O. Box 133
Fayetteville. NC 28302-0133

Benjamin Davis. Jr.. Esq.
P.O. Box 21927
Greensboro. NC 27420

January 13. 1999 DAVID W. DANIEL. CLERK

/S/ Sue A. Towe
(By) Deputy Clerk

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 99-1308
District Court Docket No. 5:97-CV-450-BO (2)

HOMER WALKER.	)	
	)	
Petitioner	)	
	)	
V.	)	**MOTION FOR MANDAMUS**
	)	
NATIONSBANK.	)	
JOE TEMPLE. C. KIM	)	**PURSUANT TO**
NAZARCHYK. AND	)	**28 USC § 1361**
FAYE McDANIEL.	)	
Respondents	)	
	)	

INTRODUCTION

Now comes petitioner Homer W. Walker, and respectfully move this honorable court to issue and order pursuant to 28 USC § 1361 to compel the honorable Terrence W. Boyle, who is a United States judge in the Eastern District of North Carolina to perform his duty.

JURISDICTION AND VENUE

Accordingly the honorable Terrence W. Boyle is a United States judge in the Eastern District of North Carolina. Pursuant to 28 USC § 1361, venue regarding this matter is proper in this court.

APPENDIX G

STATEMENT OF FACTS

1. On May 6. 1997. pursuant to the order of the honorable Jack A. Thompson. petitioner refiled his state law civil action against respondents in Cumberland County Superior Court. Fayetteville. North Carolina.

2. On June 4. 1997. respondents removed petitioner's state law claim to federal court.

3. On July 1. 1997. petitioner filed motion to remand his state court action back to state court.

4. On July 8. 1997. respondents filed motion to dismiss and motion for anti-suit injunction.

5. On December 19. 1997. the District Court entered an order rendering petitioner's motion to remand moot. dismissed petitioner's claim from federal court. and barred petitioner from relitigating his state court action in state or federal court.

6. On September 15. 1998. petitioner filed motion pursuant to Rule 60 of the Federal Rules of Civil Procedure to set aside the order and judgment entered on December 19. 1997. together with supporting memorandum of law requesting that the District Court remand petitioner's state court action back to state court.

7. On November 26. 1998. the court entered an order denying petitioner's Rule 60 motion. and ordered the petitioner to show cause as to why the court should not order petitioner to pay a penalty of $1.000.00 to the court for filing

the Rule 60 motion and directed the Clerk of Court not to accept any filings from petitioner other than one showing cause why sanctions should not be imposed on petitioner.

8. On December 4, 1998, in keeping with the order of the court, petitioner filed Motion to Show Cause and requesting that the court reconsider its order denying petitioner's Rule 60 motion.

9. On January 10, 1999, the court entered its order in the Show Cause motion. In the January 10, 1999 order, the court imposed a non-financial sanction on petitioner and placed petitioner under a pre-filing injunction, and permanently enjoined petitioner from filing, commencing, or attempting to initiate any new lawsuit, action, proceeding, or matter in that federal court and directed the Clerk of Court to take such actions as are necessary to implement the pre-filing injunction.

DUTY OWED PETITIONER IS AS SUCH:

Refusal to act in accordance with Rule 60 of the federal Rules of Civil Procedure. . .refusal to act in accordance with Rule 12 (h(\) of the federal Rules of Civil Procedure. . .duty owed to petitioner is as such.

1. Set aside the court's order dated December 19,1997, rendering petitioner's Motion to Remand moot and barring petitioner from relitigating his state court action.

2. Remand petitioner's state court action back to Cumberland County Superior Court, Fayetteville, North Carolina, which would assure petitioner his day in court, which petitioner has repeatedly been denied by the United States District Court.

3. To strict the District Court's order dated January 10, 1999 which placed petitioner under a pre-filing injunction and permanently enjoined petitioner from filing, commencing, or attempting to initiate any new lawsuit, action, proceeding, or matter in federal court.

Petitioner has attached hereto petitioner's memorandum of law in support of this motion for mandamus and supporting appendix.

March 4, 1999

Homer W. Walker / Pro Se
P.O. Box 133
Fayetteville, NC 28302
(910) 868-2500

CERTIFICATE OF SERVICE

This is to certify that the undersigned deposited a copy of the foregoing in the United States mail, First Class postage paid and properly addressed to:

Benjamin Davis, Jr.
Counsel for Respondents
P.O. Box 21927
Greensboro, NC 27420

this 4 day of March, 1999.

Homer W. Walker
P.O. Box 133
Fayetteville, NC 28302
(910) 868-2500

APPENDIX – G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COA Case No. 99-1308

District Court Docket No. 5:97-CV-450-BO (2)

HOMER W. WALKER,)
Petitioner)
V.)
)
NATIONSBANK, JOE TEMPLE,)
C. KIM NAZARCHYK, AND)
FAYE McDANIEL,)
Respondents.)
)

CERTIFICATE OF SERVICE

This is to certify that on this 12th day of March 1999, the undersigned deposited a true copy of petitioner's memorandum of law in support of motion for mandamus in the United States mail, First Class postage paid and properly addressed to:

Hon: Terrence W. Boyle
P.O. Box 429
Elizabeth City, NC 27907-0429

David Daniel
Clerk of U.S. District Court
P.O. Box 25670
Raleigh, NC 27611

APPENDIX – G

Benjamin F. Davis. Jr.
Counsel for Defendants/Respondents
P.O. Box 21927
Greensboro. NC 27420

Homer W. Walker
P.O. Box 133
Fayetteville. NC 2830
(910) 868-2500

APPENDIX – G

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1308

In re: HOMER W. WALKER,

Petitioner.

On Petition for a Writ of Mandamus. (CA-95-450-5-BO)

Submitted: May 25, 1999 Decided: June 1, 1999

Before ERVIN, WILKINS, and MICHAEL, Circuit Judges.

Petition denied by unpublished per curiam opinion.

HOMER W. WALKER, Petitioner Pro Sé.

Unpublished opinion are not binding precedent
in this circuit. See Local Rule 36 (c).

APPENDIX – H

PER CURIAM:

Homer W. Walker has filed a petition for a writ of mandamus seeking an order to set aside a pre-filing injunction entered by the district court. Mandamus is a drastic remedy to be used only in extraordinary circumstances. See Kerr v. United States District Court, 426 U.S. 394, 402 (1976). Mandamus relief is only available when there are no other means by which the relief sought could be granted. see In re Beard, 811 F.2d 818.826 (4th Cir. 1987). and may not be used as a substitute for appeal. See In re United Steelworkers, 595 F.2d 958, 960 (4th Circuit 1979). The party seeking mandamus relief carries the heavy burden of showing the he has "no other adequate means to attain the relief he desires" and that his right to such relief is "clear and indisputable." Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). Walker has not made such a showing. Accordingly, we deny mandamus relief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

PETITION DENIED

APPENDIX – H